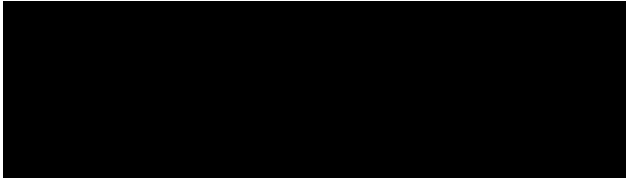


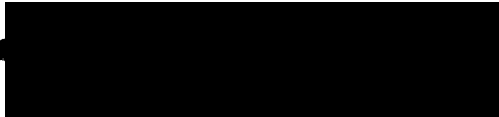


U.S. Citizenship
and Immigration
Services



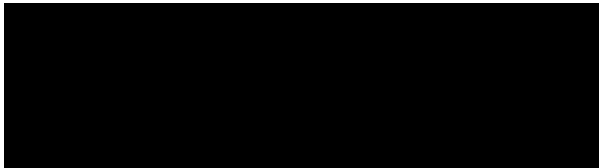
FILE: WAC-02-168-50585 Office: CALIFORNIA SERVICE CENTER Date: JUL 8 2004

IN RE: Petitioner:
Beneficiary:



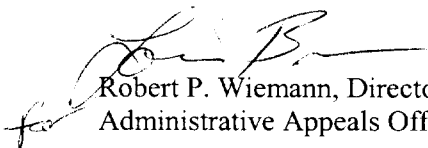
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a classic auto parts manufacturing and upholstery firm. It seeks to employ the beneficiary permanently in the United States as a classic auto upholsterer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal counsel states that calculations based on the amounts received by the beneficiary and on the petitioner's tax returns establish the petitioner's ability to pay the proffered wage during the relevant period.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is November 13, 1998. The beneficiary's salary as stated on the labor certification is \$10.97 per hour or \$22,817.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's work experience. The evidence relevant to the petitioner's ability to pay the proffered wage consisted of a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001.

In a request for evidence (RFE) dated July 12, 2002 the director requested additional evidence to establish the beneficiary's experience and to establish the petitioner's ability to pay the proffered wage. In response to the RFE counsel submitted a letter dated August 27, 2002 from a former employer of the beneficiary in Mexico certifying the beneficiary's experience from May 1990 until July 1993 as an upholsterer; a copy of the petitioner's California Fictitious Business Name Statement dated September 27, 1996; copies of the petitioner's California Form DE-6 quarterly wage and withholding reports for the last two quarters of 2001 and the first two quarters of 2002; copies of Form 1040 U.S. individual income tax returns of the petitioner's owner and his wife for 1998, 1999, and 2000; and an additional copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001.

In a request for evidence (RFE) dated October 2, 2002, the director noted that Part B of the Form ETA 750 indicates that the beneficiary has been working for the petitioner since August 1993 and the director requested copies of the beneficiary's W-2 forms for the years 1998, 1999, 2000 and 2001.

In response to the second RFE, counsel submitted copies of the beneficiary's Form 1040 U.S. individual income tax returns for 1998, 1999 and 2000; an incomplete copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2001; copies of the beneficiary's California Form 540 California resident income tax returns for 2000 and 2001; and a letter dated October 17, 2002 from the petitioner's owner.

In a Notice of Intent to Deny dated March 21, 2003 the director informed the petitioner that the evidence in the record failed to establish the petitioner's ability to pay the proffered wage, noting that the petitioner had failed to provide W-2 forms of the beneficiary as requested for the years 1998 through 2001. The director gave the petitioner thirty days to submit the beneficiary's W-2 forms for the years 1998 through the present and to submit complete federal tax returns for the beneficiary for those same years.

In response to the ITD the petitioner submitted a letter dated April 7, 2003 from the petitioner's owner stating that the beneficiary had been employed by the petitioner from August 1998 to the present on a piecework basis, and that the beneficiary was responsible for filing his own taxes. With the letter the petitioner also submitted additional copies of Form 1040 U.S. individual income tax returns of the petitioner's owner and his wife for 1998, 1999, and 2000; a third copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001; additional copies of the beneficiary's Form 1040 U.S. individual income tax returns for 1998, 1999 and 2000; a complete copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2001, of which only a partial copy was submitted previously; and a complete copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits evidence consisting of additional copies of the beneficiary's Form 1040 U.S. individual income tax returns for 1998 through 2002; additional copies of the beneficiary's California Form 540 California resident income tax returns for 1999 through 2002; additional copies of Form 1040 individual income tax returns of the petitioner's owner and his wife for 1998 through 2000; and an additional copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001. No evidence is submitted for the first time on appeal.

Counsel states on appeal that calculations based on the petitioner's tax returns establish the petitioner's ability to pay the proffered wage during the relevant period. Counsel asserts that the petitioner should be given credit for amounts paid to the beneficiary.

Since no evidence is newly-submitted on appeal, the AAO will evaluate the decision of the director based on the record before the director.

An initial question concerns whether the petitioner is the successor in interest to the business which filed the ETA 750 labor certification. The name of the business on the ETA 750 is the same as the name of the petitioner on the Form I-140 petition. However, the petitioner's tax documents in the record show that the legal structure of the petitioning business changed in 2001. At the time the ETA 750 was filed, on November

13, 1998, the business was a sole proprietorship. The copy of the petitioner's Form 1120S tax return in the record shows that in 2001 the business became an S corporation.

This status of successor in interest requires documentary evidence that successor has assumed all of the rights, duties, and obligations of the predecessor company. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant case, the petitioner is operating under the same name and at the same location as the business which filed the ETA 750 labor certification. The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 shows in Item A the effective date for election as an S corporation as February 1, 2001. The Schedule K attached to that return shows 100% of the shares of the corporation are owned by the same person who was the owner of the business as a sole proprietorship. The Schedule L attached to the 2001 return shows that the corporation began the year with zero assets and zero liabilities and ended the year with total assets of \$111,101 and with total liabilities and shareholders' equity of \$111,101, balancing the total assets. The shareholders equity consisted of \$1,000 of capital stock and \$9,247 in retained earnings. The liabilities included \$98,314 in loans from shareholders. A supporting statement attached to the schedule L shows that the loans from shareholders were owed to the individual who is the sole owner of the corporation, information which is consistent with the Schedule K. The foregoing information is sufficient to establish that the petitioner is a successor in interest to the business which filed the ETA 750B. See *Matter of Dial Auto Repair Shop, Inc.*, *supra*.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

Counsel asserts in his notice of appeal that the petitioner should be given credit for amounts paid to the beneficiary. However, the evidence in the record is insufficient to establish the amounts of any payments to the beneficiary. The letter dated April 7, 2003 from the petitioner's owner states that the beneficiary has been employed by the petitioner since August 1993. As an explanation for the absence of the W-2 forms which had been requested by the director the owner states that the beneficiary was employed on a piecework basis and that the beneficiary is responsible for filing his own taxes. The petitioner's tax returns do not specify any amounts paid to the beneficiary. The beneficiary's tax returns contain attached Schedule C-EZ's which show income from the beneficiary's business as a mechanic, but the beneficiary's tax returns do not specify the source or sources of the income received by the beneficiary. Therefore the record fails to provide support for the assertions of counsel on the amounts of payments claimed to have been made by the petitioner to the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no

precedent that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” See *Elatos Restaurant Corp.*, 632 F. Supp., at 1054.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1040 U.S. Individual Income Tax Return of the owner of the business. In the instant petition, the joint tax returns of the owner and his wife show the following amounts for adjusted gross income: \$58,177.00 for 1998; \$67,202.00 for 1999; and \$92,329.00 for 2000. If the petitioner had paid the beneficiary the proffered wage of \$22,817.60 in each of those years, the amounts remaining for the owner’s personal and household expenses would have been \$35,359.40 in 1998; \$44,384.40 in 1999; and \$69,511.40 in 2000.

No request was made by the director for a statement of the owner’s monthly household expenses, and no information on that issue is found in the record. According to the tax returns of the owner and his wife, the owner’s household during the years 1998, 1999 and 2000 consisted only of the owner and his wife. Notwithstanding the absence of information on the owner’s monthly household expenses, the AAO finds that the amounts remaining to the owner if he had paid the beneficiary the proffered wage in 1998, 1999 and 2000 would have been sufficient to pay the owner’s household expenses.

Beginning in 2001 the business was organized as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner’s tax return for 2001 shows ordinary income of \$9,247.00 for 2001. Since that figure is less than the proffered wage of \$22,817.60 it fails to establish the petitioner’s ability to pay the proffered wage that year.

As an alternative means of determining the petitioner’s ability to pay the proffered wages, CIS may review the petitioner’s net current assets. Net current assets are a corporate taxpayer’s current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation’s year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation’s net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner’s ability to pay.

Calculations based on the Schedule L attached to the petitioner’s Form 1120S tax return for 2001 yield the figure of \$83,686.00 for net current assets for the end of the year. Since that amount is greater than the proffered wage of \$22,817.60 the net current assets are sufficient to establish the ability of the petitioner to pay the proffered wage during 2001.

No copy of the petitioner’s tax return for 2002 was submitted. The petitioner’s tax return for 2001 was the most recent return available at the time of the first and second RFE’s, in July and October 2002. The director’s last request for evidence was made in the ITD, dated March 21, 2003. The ITD referred only to tax documents of the beneficiary and made no request for the petitioner’s tax return for 2002. The petitioner’s response to the ITD was made on April 11, 2003, at which time its tax return for 2002 was not yet due. For the foregoing reasons, the petitioner’s tax return for 2001 is found to be the most recent tax return available when the last evidence was submitted to the director.

In the director's decision, the director stated the following figures as the petitioner's taxable income: \$37,746.00 for 1998 (Form 1040); \$46,632.00 for 1999 (Form 1040); \$70,153.00 for 2001 (Form 1040); and \$9,247.00 for 2001 (Form 1120S). The director also found that the petitioner's net current assets for 2001 were \$3,686.00, based on Form 1120S.

the figure of \$9,247.00 cited by the director as the petitioner's taxable income for 2001, \$9,247.00 is correct. The amounts stated by the director as the petitioner's "taxable income" for 1998, 1999 and 2000 are less than the owner's "adjusted gross income" by the following amounts: \$20,431.00 for 1998; \$20,570.00 for 1999; and \$22,176.00 for 2000. Also, the amount of \$3,686.00 stated by the director as the petitioner's net current assets for 2001 is \$80,000.00 less than the petitioner's actual net current assets of \$83,686.00 at the end of 2001.

Furthermore, the director found that the household of the petitioner's owner consisted of one person, though the joint tax returns of the owner and his wife show that the petitioner's household consisted of two persons during the relevant period.

Using the incorrect figures stated above, the director found that the evidence failed to establish the ability of the petitioner to pay the proffered wage, while still allowing sufficient remaining funds to pay the reasonable household expenses of the petitioner's owner. The director erred in relying on incorrect figures when analyzing the petitioner's ability to pay the proffered wage. The errors in the director's figures were large enough to affect the outcome of the director's decision. The director's decision to deny the petition based on his analysis was therefore incorrect.

As shown in the analysis above, the petitioner's tax returns are sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. In each of the years 1998 through 2000 the adjusted gross income of the owner and his wife was sufficient to pay the proffered wage and to pay the reasonable household expenses of the owner. For the year 2001 the net current assets of the S corporation were sufficient to pay the proffered wage. The petitioner's appeal therefore overcomes the decision of the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.